

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES HEALY, on behalf of himself and all
others similarly situated,

Plaintiff,

v.

MILLIMAN, INC., d/b/a INTELLISCRIP, T

Defendant.

CASE NO. C20-1473-JCC

ORDER

This matter comes before the Court on Defendant Milliman, Inc.'s motions for a protective order and for summary judgment (Dkt. Nos. 19, 24) and Plaintiff James Healy's motion to seal (Dkt. No. 34). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and DENIES in part Defendant's motion for a protective order (Dkt. No. 24), DENIES Defendant's motion for summary judgment (Dkt. No. 19), and DENIES as moot Plaintiff's motion to seal (Dkt. No. 34) for the reasons explained herein.

I. BACKGROUND

Defendant, through its IntelliScript service, provides reports to life insurance and other risk-management companies containing insurance applicants' medical and prescription histories.

1 (Dkt. Nos. 19 at 4, 32 at 8.)¹ Defendant relies on a variety of sources to compile the information
2 included in the reports, including Pharmacy Benefit Managers, pharmacies, and health insurance
3 companies. (Dkt. No. 19 at 4.) Defendant captures a significant volume of data and has prepared
4 over 40 million reports in the last six years. (*Id.* at 19.) As a result, Defendant relies heavily on
5 automated processes to gather the information and then applies algorithms to analyze it. (Dkt.
6 Nos. 19 at 4–5, 32 at 8–9.)

7 Defendant relies on a system to match individuals’ personal identifying information to
8 their medical and prescription records to ensure that the information included in its reports
9 relates to the appropriate individual. (Dkt. No. 19 at 6.) This identifying information includes an
10 individual’s name, social security number, date of birth, and zip code. (*Id.* at 6.) But in order “to
11 account for misspelling and other [potential] errors” in the data it receives, it also includes
12 information for individuals with near names, *i.e.*, “same consonants, reversing first and last
13 names, [and] nicknames.” (*Id.* at 5.) In some instances, Defendant also “remov[es] the suffix or
14 hyphen” in an individual’s name (*Id.*) This indisputably results in the inclusion of erroneous
15 information in Defendant’s reports, the frequency of which is the subject of this suit. (*Compare*
16 Dkt. No. 19 at 2, *with* Dkt. No. 32 at 12.)

17 Plaintiff applied for life insurance in 2020 and was denied coverage based on a report
18 from Defendant to his prospective insurer that listed several conditions Plaintiff never had. (Dkt.
19 Nos. 19 at 6, 32 at 9.) The errors were substantial and included the following wrongly attributed
20 conditions: osteoarthritis, diabetes, liver disease, chest pains, and sleep apnea. (Dkt. No. 40 at 5–
21 14.) Plaintiff contacted Defendant regarding the erroneous report. (Dkt. No. 32 at 9.) Yet despite
22 what Defendant describes as its “rigorous reinvestigation protocols,” it is undisputed that it did
23 not correct the report in a timely manner. (Dkt. No. 19 at 6.) As a result, when Plaintiff reapplied
24 for life insurance with the same insurer, he was again denied. (Dkt. No. 32-1 at 3.) Defendant
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26 ¹ Defendant asserts that the applicants authorize it to compile this information by
completing a HIPAA authorization when they apply for insurance. (Dkt. No. 19 at 4.)

1 indicates that its failure to timely correct Plaintiff's report was human error on the part of its staff
2 and not reflective of a systematic failure. (Dkt. No. 19 at 2.)

3 Plaintiff filed a class-action complaint asserting that Defendants' actions violated the Fair
4 Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* (Dkt. No. 1). In it he alleged violations
5 of § 1681e(b) for inaccurate reporting, §1681i(a) for a failure to adequately investigate errors,
6 § 1681i(f) for a failure to forward disputed items for resolution to source consumer reporting
7 agencies, and § 1681g(a)(2) for a failure to disclose to Plaintiff the sources of the information
8 that Defendant included in the report. (Dkt. No. 1 at 13–15.)

9 Litigation in this putative class action is still in its early stages. Defendant answered
10 Plaintiff's complaint in December 2020. (Dkt. No. 14.) The parties held their Rule 26(f)
11 conference and made initial disclosures in February 2021. (Dkt. No. 33 at 2.) At the time,
12 Plaintiff lodged 63 requests for production ("RFP"). (*See* Dkt. No. 25 at 9–38.) In general, they
13 address how Defendant gathers and processes the data included in its reports, its quality control
14 system, and how it resolves disputed items. (*Id.*) In response, Defendant produced just nine
15 documents. (Dkt. No. 25 at 9–38.)² Following two discovery conferences, Defendant moved for
16 a protective order and for summary judgment. (*See* Dkt. Nos. 19, 24). Defendant argues that
17 Plaintiff's suit is nothing more than a "fishing expedition based on a hunch" that Defendant's
18 systems and procedures are inadequate under the FCRA. (Dkt. No. 24 at 5.) In response, Plaintiff
19 asks the Court to deny summary judgment pursuant to Federal Rule of Civil Procedure 56(d) and
20 to strike certain declarations in support of Defendant's summary judgment motion. (Dkt. Nos. 32

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22 ² Specifically, Defendant produced the following:

- 23 (1) a six-page untitled document establishing "procedures for the Milliman
24 IntelliScript practice that are designed to ensure compliance with the letter and
25 spirit of the" FCRA); (2) insurance policies; (3) three copies of what appear[s] to
26 be the error-ridden Irix report Milliman sold to Americo relating to Mr. Healy; (4)
two PowerPoint presentations marketing the Intelliscript product; and (5) two
organizational charts.

(Dkt. No. 33 at 2.)

at 15, 47 at 1; *see generally* Dkt. No. 29.) Plaintiff also moves to seal certain documents Defendant labeled as “confidential” pursuant to the protective order filed in this case (Dkt. No. 28) that Plaintiff referenced and/or included in support of its opposition brief. (*See* Dkt. No. 34.)

II. DISCUSSION

Congress enacted the FCRA to “protect consumers from the transmission of inaccurate information about them.” *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Liability under the Act is “predicated on the reasonableness of the [reporting agency’s] procedures in obtaining [] information.” *Id.* at 1333. It is not a strict liability statute. *Id.*

Defendant argues that its procedures are reasonable, that Plaintiff’s experience was unique, and that Plaintiff has no colorable FCRA claims. (*See generally* Dkt. Nos. 19, 24.) Defendant suggests that it should not be forced to incur the expense of full-blown discovery, given its allegedly reasonable procedures. (*See generally* Dkt. No. 24) However, because the FCRA’s requirements are generally premised on the reasonableness of Defendant’s procedures, the discovery Plaintiff seeks is just as applicable to the class-wide allegations as it is to Plaintiff’s individual claims. The Court FINDS, for the reasons described below, that Plaintiff has met his burden to establish that the discovery sought by Plaintiff is appropriate at this time and that summary judgment prior to such discovery would be premature.

A. Defendant’s Motion for a Protective Order

The Court may “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” from unnecessary and irrelevant discovery requests. Fed. R. Civ. P. 26(c). Where class discovery is sought, “[t]he availability and scope of pre-certification discovery lie within the discretion of the Court.” *Heredia v. Eddie Bauer LLC*, 2017 WL 1316906, slip op. at 1 (N.D. Cal. 2017). “[O]ften the pleadings alone will not resolve the question of class certification and that some discovery will be warranted.” *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009). Before obtaining pre-certification discovery, “Plaintiff must ‘either make a *prima facie* showing that the Rule 23 class

1 action requirements are satisfied, or . . . show that discovery is likely to produce substantiation of
2 the class allegations.” *Lieberg v. Red Robin Gourmet Burgers, Inc.*, 2016 WL 1588381, slip op.
3 at 1 (W.D. Wash. 2016) (quoting *Ogden v. Bumble Bee Foods, LLC*, 292 F.R.D. 620, 622 (N.D.
4 Cal. 2013)).

5 Defendant seeks to limit its responses to RFPs 8, 11, 14–15, 24–25, 31–34, and 36 solely
6 to materials related to Plaintiff and to not produce any materials responsive to RFPs 12–13, 17–
7 23, 26–27, and 57–63, on the basis that those RFPs relate solely to class allegations. (Dkt. No. 24
8 at 3.) Defendant contends that Plaintiff cannot make the required *prima facie* showing or
9 demonstrate that this discovery is likely to substantiate the class allegations because Plaintiff
10 “lacks a cognizable claim under the FCRA.” (*Id.* at 2.) Defendant separately argues that the
11 requests for production are “vastly overbroad, unduly burdensome, and disproportionate to the
12 needs of the case.” (*Id.*)

13 1. § 1681e(b) Claim

14 “Whenever a consumer reporting agency prepares a consumer report it shall follow
15 reasonable procedures to assure maximum possible accuracy of the information concerning the
16 individual about whom the report relates.” 15 U.S.C. § 1681(e)(b). Plaintiff seeks a variety of
17 discovery relevant to the issue of known errors in Defendant’s reports. (*See generally* Dkt. No.
18 25 at 11–38.) Defendant argues that Plaintiff is not entitled to that discovery at this stage because
19 Plaintiff’s claim based on a violation of this requirement is “without merit” in that it has
20 “reasonable procedures in place that ensure the accuracy of the information it provides.” (Dkt.
21 No. 24 at 8–9.)

22 Nevertheless, in this instance those “reasonable procedures” resulted in an inaccurate
23 report. Moreover, by Defendant’s own admission, 1.9% of the 81,464 consumers who requested
24 reports from Defendant between January 1, 2015 through December 31, 2020 had errors in their
25 reports. (Dkt. No. 23 at 1–2.) Without further discovery, it is impossible to say what the actual
26 number of erroneous reports over this time was. But it could be significant. Extrapolating the

1 known error rate for that subset of reports to all reports prepared by Defendant during the same
2 period would result in over 800,000 erroneous reports. (*Id.* (calculated as 42,781,776 reports x
3 1.9%).)

4 This is sufficient to demonstrate that the discovery Plaintiff seeks relevant to Plaintiff's
5 § 1681e(b) claim is permissible at this stage.

6 2. § 1681i(a) Claim

7 Within 30 days of a dispute lodged by a consumer, a reporting agency must, "free of
8 charge, conduct a reasonable investigation to determine whether the disputed information is
9 inaccurate" and delete "the information found to be inaccurate." 15 U.S.C. §§ 1681i(a)(1)(A),
10 (a)(5). Defendant admits that here it took six months to complete this process. (Dkt. No. 22 at 2–
11 5.) However, Defendant argues that this was the result of human error, rather than a systemic
12 deficiency. (Dkt. No. 24 at 10.) Regardless, at least here, the investigation was unreasonably
13 delayed and, without the discovery sought, Plaintiff has no means to determine whether his
14 experience was, in fact, unique. *See Doninger v. P. N.W. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir.
15 1977) ("the necessary antecedent to the presentation of evidence is, in most cases, enough
16 discovery to obtain the material, especially when the information is within the sole possession of
17 the defendant."). This is sufficient to demonstrate that discovery relevant to Plaintiff's § 1681i(a)
18 claim is permissible at this stage.

19 3. § 1681i(f) Claim

20 The investigation requirement described in § 1681i is limited for resellers of consumer
21 information. *See* 15 U.S.C. § 1681i(f)(1). At a minimum, though, resellers must, upon notice of a
22 dispute, convey that notice in a timely manner to the consumer reporting agency who provided
23 the information at issue. 15 U.S.C. § 1681i(f)(2). Defendant argues that Plaintiff's § 1681i(f)
24 claim is without merit and not deserving of discovery because it is not a reseller. (Dkt. No. 24 at
25 6–7.) This is based on Defendant's assertion that it "utilizes its proprietary systems to both
26 assemble and evaluate consumer information to provide an insurance company a unique

1 applicant ‘score’ based on the applicant’s medical and prescription history.” (*Id.*)

2 A “reseller” is defined as a consumer reporting agency that “assembles and merges
3 information contained in the database of another consumer reporting agency . . . for purposes of
4 furnishing such information to any third party, *to the extent of such activities* . . . and does not
5 maintain a database of the assembled or merged information from which new consumer reports
6 are produced.” 15 U.S.C. § 1681a(u) (emphasis added). A plain reading of the statute suggests
7 that a company could be a reseller with respect to some of its activities and not a reseller with
8 respect to others, depending on whether it is collecting the information from another consumer
9 reporting agency or elsewhere. While Defendant argues that an all-or-nothing approach is
10 required, its interpretation of relevant caselaw is not sufficiently persuasive to conclude that
11 further discovery on Plaintiff’s reseller claim is not warranted. (*See* Dkt. Nos. 19 at 16, 41 at 4,
12 43 at 4–5 (citing *Heagerty v. Equifax Info. Servs. LLC*, 447 F. Supp. 3d 1328, 1346 (N.D. Ga.
13 2020); *Poore v. Sterling Testing Sys., Inc.*, 410 F. Supp. 2d 557, 568 (E.D. Ky. 2006)).)

14 4. § 1681g(a)(2) Claim

15 A consumer reporting agency such as Defendant, must “upon request . . . disclose to the
16 consumer . . . the sources of the information” used in its report. 15 U.S.C. § 1681g(a)(2).
17 Defendant asserts that Plaintiff’s claim based on a violation of this provision does not warrant
18 discovery because Plaintiff never pled that he made a request. (Dkt. Nos. 19 at 6, 24 at 7.) But
19 according to the complaint, Plaintiff “requested a copy of his file” and that Defendant “did not
20 identify the . . . sources of the information contained in the report.” (Dkt. No. 1 at 8–9.)³ This
21 allegation is sufficient to warrant further discovery regarding information relevant to Plaintiff’s
22 § 1681g(a)(2) claim, in light of Defendant’s concession that its website, where Plaintiff was
23 initially directed to request information on his report, did not offer the option to request source
24 information. (Dkt. No. 19 at 17); *see Patel v. Trans Union, LLC*, 308 F.R.D. 292, 305 (N.D. Cal.

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26 ³ Defendant takes issue with the veracity of this allegation. (*See* Dkt. No. 19 at 17.) It
would be premature for the Court to address this argument.

1 2015) (specific language not required to trigger § 1681g(a) obligation when reporting agency
2 “did not tailor its disclosure to specific consumer requests.”)

3 5. Breadth of Production Sought

4 Defendant separately asserts that the discovery Plaintiff seeks is “overbroad, unduly
5 burdensome, and target[s] irrelevant information.” (Dkt. No. 24 at 10.) After having reviewed the
6 RFPs at issue, the Court agrees that numbers 21 and 22, while relevant, are overbroad in that
7 they are not time-limited. (See Dkt. No. 25 at 20–21.) The Court disagrees with Defendant’s
8 contention regarding the remaining disputed RFPs.

9 Accordingly, Defendant’s motion for a Rule 26(c) protective order is GRANTED with
10 respect to RFPs 21 and 22 and DENIED with respect to the remaining requests.

11 **B. Defendant’s Motion for Summary Judgment**

12 “The [C]ourt shall grant summary judgment if the movant shows that there is no genuine
13 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
14 Civ. P. 56(a). A fact is material if it “might affect the outcome of the suit under the governing
15 law,” and a dispute of fact is genuine if “the evidence is such that a reasonable jury could return
16 a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
17 A party opposing summary judgment that “cannot present facts essential to justify its opposition”
18 has another option: it may request that the Court delay consideration of the summary judgment
19 motion so that it may conduct further discovery. Fed. R. Civ. P. 56(d). “A party requesting a
20 continuance pursuant to Rule 56(f) ⁴ must identify by affidavit the specific facts that further
21 discovery would reveal, and explain why those facts would preclude summary judgment.” *Tatum*
22 *v. City and Cnty. of S.F.*, 441 F.3d 1090, 1100 (9th Cir. 2006). The party must also present
23 “some basis for believing that the information sought actually exists.” *VISA Int’l Serv. Ass’n v.*

24 ⁴ In 2010, Rule 56(f) was renumbered to Rule 56(d). Rule 56(d) “carries forward without
25 substantial change the provisions of former subdivision (f),” so authority applying former Rule
26 56(f) applies equally to Rule 56(d). Fed. R. Civ. P. 56(d) advisory committee’s note to 2010
amendment.

1 *Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986). An affidavit based on
2 speculation does not suffice, *Margolis v. Ryan*, 140 F.3d 850, 854 (9th Cir. 1998), nor does
3 “[t]he mere hope that further evidence may develop prior to trial,” *Cont’l Mar. of S.F. v. Pac.*
4 *Coast Metal Trades Dist. Council, Metal Trades Dep’t, AFL-CIO*, 817 F.2d 1391, 1395 (9th Cir.
5 1987).

6 Defendant first argues that Plaintiff fails to establish genuine issues of material fact with
7 respect to each of the four FCRA claims described above. (Dkt. No. 19 at 8–18); *see supra* Part
8 II.A. In response, Plaintiff asks the Court to deny Defendant’s motion or defer ruling on it
9 pursuant to Rule 56(d) because there are facts subject to the outstanding discovery requests that
10 are solely in Defendant’s possession and are essential to justify Plaintiff’s opposition to
11 Defendant’s summary judgment motion. (Dkt. No. 32 at 16–27 (citing Fed. R. Civ. P. 56(d)).) In
12 support, Plaintiff provides a declaration describing the specific facts he seeks to discover, which
13 are likely to exist and are solely within Defendant’s control, and articulates why those facts are
14 essential to his opposition. (*See* Dkt. No. 36 at 2–5.) Based on this declaration, the Court FINDS
15 that summary judgment on Plaintiff’s claims based on Defendants arguments described above,
16 *see supra* Part II.A, would be premature.

17 Defendant next argues that Plaintiff fails to present evidence supporting the notion that
18 Defendant’s acts were willful, thereby precluding an award of FCRA statutory damages. (*Id.* at
19 18–23.) For willful violations, the FCRA provides damages ranging from \$100 to \$1000,
20 punitive damages, and attorney fees and costs. 15 U.S.C. § 1681n. A willful act is both an
21 intentional and a reckless act, which is something more than being “careless.” *Safeco Ins. Co. of*
22 *Am. v. Burr*, 551 U.S. 47, 57, 69 (2007). For negligent violations, a consumer is limited to actual
23 damages. 15 U.S.C. § 1681o.

24 As Plaintiff points out, many courts have held that the willfulness of an alleged FCRA
25 violation is not an appropriate issue for summary judgment. (Dkt. No. 32 at 27 (citing *Edwards*
26 *v. Toys “R” Us*, 527 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007) (collecting cases); *Hammer v. JP’s*

1 *S.W. Foods, L.L.C.*, 739 F. Supp. 2d 1155, 1167 (W.D. Mo. 2010) (same)).) Nevertheless, the
2 Court need not opine on that issue.

3 It is clear that, even if willfulness were an issue appropriate for summary judgment,
4 additional discovery is required before Plaintiff could put forth evidence addressing it. Plaintiff's
5 outstanding RFPs seek information regarding other disputes and complaints that Defendant has
6 received; its policies and procedures to resolve those disputes; communications with its data
7 sources and clients; and the algorithms, matching software, and mechanisms that Defendant
8 applies to the data it receives. (*See* Dkt. No. 25 at 9–37.) All of which speak to whether
9 Defendant acted in a merely careless manner, or its actions rose to the level of recklessness. The
10 Court need not address Defendant's separate argument regarding a lack of actual damages. (*See*
11 Dkt. No. 19 at 20–23.) It is mooted by the Court's determination that declining summary
12 judgment on the availability of statutory damages is warranted.

13 Accordingly, Defendant's motion for summary judgment is DENIED. Separately, the
14 Court need not address Plaintiff's request to strike (Dkt. Nos. 32 at 15, 47 at 1) portions of the
15 declarations that Defendant filed in support of its summary judgment motion, as they were not
16 necessary for the Court to reach its holding on Defendant's motion.

17 **C. Plaintiff's Motion to Seal**

18 Plaintiff moved to maintain under seal unredacted versions of its brief opposing
19 Defendant's summary judgment motion, a declaration supporting that brief, and an exhibit
20 attached to the declaration. (Dkt. No. 34 at 1 (referencing Dkt. Nos. 35–37).) All of these
21 documents contain references to an internal policy document that Defendant labeled as
22 "confidential" when producing it pursuant to the protective order entered in this case. (*See* Dkt.
23 Nos. 28, 34 at 1.) Defendant has since consented to removal of the "confidential" designation
24 and Plaintiff has requested that the Court unseal the documents he previously filed under seal.
25 (*See* Dkt. Nos. 49 at 1, 50 at 1–2.) Accordingly, Plaintiff's motion to maintain these documents
26 under seal (Dkt. No. 34) is DENIED as moot.

1 **III. CONCLUSION**

2 For the foregoing reasons, Defendant's motion for a protective order (Dkt. No. 24) is
3 GRANTED in part and DENIED in part, its motion for summary judgment (Dkt. No. 19) is
4 DENIED, and Plaintiff's motion to seal (Dkt. No. 34) is DENIED as moot. Defendant need not
5 respond to RFPs 21 and 22 as submitted. However, Plaintiff may revise and resubmit RFPs 21
6 and 22, to contain a reasonable time limitation, within seven (7) days of this order. Finally, the
7 Clerk is DIRECTED to unseal Docket Numbers 35, 36, and 37.

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9 DATED this 14th day of May 2021.

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13 John C. Coughenour
14 UNITED STATES DISTRICT JUDGE
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